

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j) of the)	MM Docket No. 97-234
Communications Act -- Competitive Bidding)	
for Commercial Broadcast and Instructional)	
Television Fixed Service Licenses)	
)	
Reexamination of the Policy Statement)	GC Docket No. 92-52
on Comparative Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN. Docket No. <u>90-264</u>
Comparative Hearing Process to Expedite)	
the Resolution of Cases)	

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Now comes Booth, Freret, Imlay and Tepper, P.C. (BFITPC), a communications law firm, for itself and on behalf of certain of its AM radio broadcast clients, pursuant to Section 1.429 of the Commission's Rules, hereby respectfully requests that the Commission review and reconsider portions of the *Memorandum Opinion and Order*, FCC 99-74, released in the captioned rulemaking proceeding on or about April 20, 1999 (the "MO&O"). This petition refers only to the portion of the MO&O dealing with technical amendments which would resolve mutual exclusivity between or among applicants for new AM broadcast stations. As good cause for its Petition, BFITPC states as follows:

1. Certain clients of BFITPC are licensed broadcasters or applicants for new or modified

AM Broadcast stations. They are directly interested in, and directly affected by, the means by which the Commission intends to resolve mutual exclusivity between and among competing applicants for new and major change AM broadcast construction permits. Certain of the Firm's clients were participants in this proceeding (See, e.g. the *First Report and Order* in that proceeding, FCC 98-194, released August 18, 1998, at footnote 112), on the subject of resolving mutual exclusivity between and among broadcast applicants for new or major change facilities. That is the subject of BFITPC's instant Petition.

2. The MO&O, at paragraph 58, notes (for the first time in this proceeding) that, in implementing competitive bidding in the AM broadcast context, the Commission will, post-filing of new or major change AM applications, allow engineering amendments as a means of resolving mutual exclusivity between or among major change applicants, and between applicants for new construction permits and major change applicants. It will not, however, permit technical amendments to resolve mutual exclusivity between or among applicants for new construction permits. This is not only completely arbitrary and unfair; it is also inconsistent with the plain language of Section 309(j)(6)(E) of the Communications Act of 1934, as amended. 3. The Commission intends to permit the filing of short-form applications in a broadcast auction window. During this period, an applicant may invest a substantial amount of money in planning, and in engineering and legal costs, to determine the technical feasibility of such a project. Purely fortuitously, another applicant may file an application for the same frequency at a proposed location perhaps several hundred miles away. The applications, once filed, may initially be mutually exclusive due to technical considerations at the time of filing, but with minor technical amendments, both might very well be grantable, and no mutual exclusivity need exist. Such

grants might provide multiple first transmission services, a principal goal of Section 307(b) of the Communications Act of 1934. Settlements of mutually-exclusive AM applications by technical amendments which accommodate all applicants have in the past been routinely conducted. The Commission, however, has decided, notwithstanding the uniqueness of the AM assignment mechanism, to preclude technical amendments between or among these applicants under all circumstances, ostensibly to preclude collusion.

4. First of all, it is impossible to suggest that there would be collusion between or among mutually-exclusive applicants for new AM broadcast stations, potentially several hundred miles apart, to any greater extent than there would be collusion between or among applicants for major change AM facilities. The distinction makes no sense. Secondly, the prohibition of any technical amendments in order to resolve mutual exclusivity denies an opportunity to those who have invested significant time, effort and money, since only one of the applications may be granted. Even a de minimus overlap between applications for facilities perhaps hundreds of miles apart would require an auction, no matter how minor an amendment would be necessary in order to eliminate the exclusivity.

5. Most importantly, the Commission cannot interpret Section 309(j)(6)(E) to permit the Commission to require an auction where simple technical amendments could avoid or resolve the exclusivity. That mandate states that nothing in the use of competitive bidding shall "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." The Commission must therefore permit technical amendments at some point by mutually-exclusive applicants for

new AM broadcast stations in order to allow the applicants to eliminate the exclusivity that would otherwise trigger an auction.

6. Indeed, because new AM broadcast applicants proposing different cities of license necessitate a Section 307(b) analysis prior to an auction anyway, technical amendments could resolve any exclusivity, and thus eliminate the need for a Section 307(b) analysis. The *First Report and Order* stated, at paragraph 120 (in relevant part), as follows:

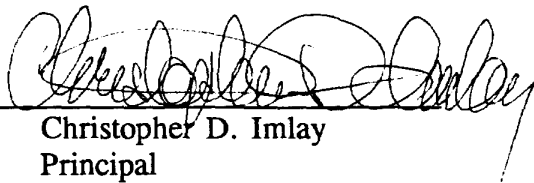
After consideration...we conclude that, our competitive bidding authority under Section 309(j) should be implemented in a way that accommodates our statutory duty under Section 307(b) to effect an equitable geographical distribution of stations across the nation. Congress specifically directed that the requirements of Section 307 should not be affected by the use of competitive bidding. *See*, 47 U.S.C. §309(j)(6)(B). Thus, our obligation to fulfill the Section 307(b) statutory mandate endures. The Commission and the courts have traditionally interpreted Section 307(b) to require that we identify the community having the greater need for a broadcast outlet as a *threshold* determination in any licensing scheme, for to decide otherwise would subordinate the "needs of the community" to the "ability of an applicant for another locality." *FCC v. Allentown Broadcasting Corp.* [349 U.S.] at 361-362 (footnote omitted). We conclude that our rules should incorporate a similar threshold Section 307(b) analysis to determine whether particular applications are eligible for auctions. Specifically, for AM applications, a traditional Section 307(b) analysis will be undertaken by the staff prior to conducting auctions of competing applications. If the Section 307(b) determination is dispositive, the staff will grant the application proposing the community with the greater need if there are no competing applications for that community, and dismiss as ineligible any competing applications not proposing to serve that community (footnote omitted). If no Section 307(b) determination is dispositive (or if more than one application remains for the community with the greater need), the applicants must then be included in a subsequently scheduled auction...

Therefore, Booth, Freret, Imlay & Tepper, P.C. respectfully requests that the Commission reconsider and revise its *Memorandum Opinion and Order* in accordance with the foregoing. Specifically, the Commission must revise its procedures to permit an opportunity for

technical amendments which resolve mutual exclusivity between applicants for new AM construction permits. Only by doing so can the Commission comply with the Section 30(j)(3)(E) obligations imposed on it by the Communications Act.

Respectfully submitted,

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